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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES A. RAY,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. There is a definite conflict between the decision of the Supreme Court of the United States in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 577, 94 L.Ed.563, 107, S.Ct. 1410 (1987), on the one hand, and the United States Court of Appeals for the Seventh Circuit, on the other, as to the standard by which to decide whether one can recover for emotional injuries under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, *et seq.*

2. Whether a claim for emotional distress alleging conduct lacking any physical contact, or threat of physical contact, and resulting in mental injury accompanied by physical manifestations is cognizable under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, *et seq.*

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit holding that the Petitioner, James A. Ray, could not recover under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, *et seq.* (hereinafter "FELA") for emotional injury where there is no showing of physical contact or threat of physical contact. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, holding that the Petitioner's claim was not within the scope of the FELA in absence of allegation that conduct which harmed employee was physical in nature is reported at *Ray v. Consolidated Rail Corp.*, 721 F.Supp. 1017 (N.D. Ill. 1989). Copies of both these decisions are attached as Appendices A and B respectively.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 2101(c). The Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit issued on July 22, 1991. This Petition is filed within ninety (90) days after the entry of such decision.

FEDERAL STATUTE INVOLVED

Federal Employers Liability Act (FELA), Sec. 1, 45 U.S.C.A. Sec. 51

Sec. 51. Liability Of Common Carriers By Railroad, In Interstate Or Foreign Commerce, For Injuries To Employees From Negligence; Employee Defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set

forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises out of an action for injuries sustained by the Petitioner during the course of his employment with Consolidated Rail Corporation (a/k/a Conrail). As a result James A. Ray filed suit in the United States District Court for the Northern District of Illinois, Eastern Division, alleging a cause of action under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, *et seq.*

B. Proceedings and Disposition of the Case Below

On May 18, 1989, the Respondent, Conrail, moved to dismiss the Petitioner's complaint. On September 28, 1989, the issues having been fully briefed, the Petitioner's complaint was dismissed for failure to allege that his injury stemmed from physical conduct as required by the FELA. The Petitioner was granted leave to file his amended complaint by October 10, 1989. Absent such a filing, it was further directed that the final judgment be entered pursuant to Fed.R.Civ.P. 58. The Petitioner chose not to file an amended complaint. On October 10, 1989, the dismissal ripened into a final order. It is from this order that appeal was taken to the United States Court of Appeals for the Seventh Circuit. The issues on appeal having been fully briefed, these same issues were argued on September 24, 1990. On July 22, 1991, the dismissal was upheld against the Petitioner's urging to reconsider the position that the FELA does not create a cause of action for tor-

tious harms brought about by acts that lack any physical contact or threat of physical contact (*Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602 (1987)), given the guidance as provided in *Buell*, supra, and in light of the Supreme Court's reservation of the issue.

The Court of Appeals determined that the issue as to whether recovery under the FELA requires proof of physical contact or the threat of physical contact already had been decided in the Seventh Circuit (attached as Appendix A).

The panel then declined to reconsider its position in *Lancaster*. The holding was further explained as follows:

> ". . . when we considered [*Hammond v. Terminal R.R. Association*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1170 (1989)] in 1988, we also considered *Lancaster* in light of *Buell* and still found that an injury under FELA requires physical contact or threat of physical contact. Appellants argue that *Hammond* is entirely distinguishable from *Lancaster*, *Buell* and the case before us today. We disagree. The precise question of whether the FELA permits recovery for damages where plaintiff does not allege physical contact or threat of physical contact was presented in all three cases and is presented again today. *In Buell the Court declined to address the question*; that the Supreme Court reserved the issue provides at best weak support for the change in our position that plaintiff seeks today. We remain unpersuaded that we must, in light of *Buell, or other authorities outside this Circuit*, recognize emotional injury under FELA where there is no showing of physical contact or threat of physical contact."

(P. 3). [emphasis added.]

The panel went on to affirm the district court's decision to dismiss Petitioner's complaint. *Id.*

C. Statement of Facts

The Petitioner James A. Ray filed an action under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, *et seq.* ("FELA"), alleging that in his capacity as a claim agent, he was harassed, threatened, and intimidated by a district claim agent and that the Petitioner was "caused to suffer a mental and physical breakdown and other injuries." (R. 1.) The pertinent allegations of Petitioner's complaint are as follows:

> . . . [D]efendant CONRAIL, through its officers, agents or employees, conducted the railroad business negligently and unlawfully and failed to provide plaintiff with a reasonably safe place to work, including, but not limited to, having fellow employees harass, threaten, and intimidate plaintiff and in particular district claims agent, Robert L. Huggins, threatened, harassed, and intimidated plaintiff maliciously and oppressively, negligently and intentionally, in order to cause personal injury to plaintiff and to cause mental and emotional injury to plaintiff. All aforesaid acts or omissions were condoned and approved by the defendant, CONRAIL, and in whole or in part of said negligence and intentional acts, plaintiff was caused to suffer a mental and physical breakdown and other injuries.
>
> . . . [A] as a result of the negligent and intentional acts or omissions of the defendant and its employees and/or agents, in whole or in part caused plaintiff to suffer severe personal injuries, severe mental and emotional injuries, causing plaintiff to incur medical and allied expenses and will in the future cause plaintiff to incur medical and allied expenses; has caused and will in the future cause the loss of earning capacity; has caused and will in the future cause pain and suffering on behalf of the plaintiff. (R. 1-2.)

The Respondent Conrail filed its Motion to Dismiss Appellant's Complaint with Supporting Memorandum, argu-

ing that the FELA does not recognize a cause of action for a purely "emotional injury" when such injury is unaccompanied by physical assault. (R. 14) After the parties fully briefed this motion and the issues raised, the district court granted Respondent Conrail's Motion and dismissed Petitioner's complaint reasoning that the Seventh Circuit's opinions in *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602 (1987) and *Hammond v. Terminal Railroad Ass'n of St. Louis*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1170 (1989) were dispositive of the issues raised by Petitioner's complaint. (R. 32.)

On July 22, 1991, the United States Court of Appeals affirmed the district court's decision to dismiss Petitioner's complaint for the reasons stated above (attached as Appendix A).

ARGUMENT—REASONS FOR ALLOWING WRIT

A. There Is A Conflict Among The Circuits, As Well As With The Most Relevant Opinion Of The Supreme Court, As To The Standard By Which To Decide Whether One Can Recover For Emotional Injuries Under The FELA.

In *Buell*, the Supreme Court focused on the jurisdictional issue of whether a claim for emotional distress is a "minor dispute" under the exclusive jurisdiction of the Railroad Adjustment Board. Upon turning its attention to the issue of whether there can be a recovery for emotional injury claims under the FELA, it was determined that the Court of Appeals for the Ninth Circuit's unequivocal position that purely emotional injuries are compensable under the FELA was too simplistic. The Supreme

Court concluded that such a determination is not necessarily a creature of solely statutory construction. Rather, it should involve exacting scrutiny of the factual circumstances peculiar to each case. Specifically, the court explained that whether one can recover upon a claim for emotional distress/injury will depend on "a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Buell*, 107 S.Ct. at 1417. The Supreme Court went on to vacate that portion of the Ninth Circuit's opinion, thereby refusing to issue the all-encompassing directive that all such claims are cognizable under the FELA. On the other hand, clearly the court was not looking with disfavor upon the recognition of emotional injury actions involving egregrious conduct and genuine and severe emotional injury.

The Supreme Court further pointed to state common law as a continuing influence towards developing, interpreting and expanding the legal principles implicated by the FELA.

In spite of the Supreme Court's tailoring of the Ninth Circuit's extreme position, the Seventh Circuit remains "unpersuaded" as to the impact of the *Buell* decision on the question of whether the FELA permits recovery for damages where a plaintiff does not allege physical contact or threat of physical contact.

The Seventh Circuit's position, that recovery under the FELA *requires* proof of physical contact or the threat of physical contact, illustrates the opposite extreme of the position previously taken by the Ninth Circuit, and must be similarly tailored to accurately reflect the discussion in *Buell*.

However, it is the Seventh Circuit's conclusion that the *Buell* opinion is not instructive on the issue of whether

wholly mental injury necessitates an allegation that the injury resulted from physical contact or threat of physical contact in order to state a compensable claim under the FELA. This stance is contrary to various jurisdictions that have considered the issue subsequent to *Buell*.

One illustration of this statement arises in the case of *Teague v. Amtrak*, 708 F.Supp. 1344 (Mass. 1989). The *Teague* court discarded reasoning such as in *Gillman v. Burlington Northern Railroad Co.*, 878 F.2d 1020 (7th Cir. 1989), as too narrow a limitation upon what it views as the properly broadening scope of legal principles under the FELA.[1] Furthermore, the *Teague* position has since been found to be persuasive in at least the First, Second and Third Circuits.

The effective repercussion of the Seventh Circuit's opinion below is that in any similarly positioned jurisdiction there will never be an instance where a factually complete record will be developed on a claim for emotional injury lacking the requisite element of physical contact or threat of physical contact. If this position is allowed to be maintained, the Supreme Court will never be presented with the opportunity to fill in the gaps in this area left by *Buell*.

On the other hand, in jurisdictions that recognize the cause of action in light of the *Buell* guidance, it is simply not an issue.

This is the quandary that plaintiffs, and in particular this Petitioner, find themselves in due to the categorical position of excluding this cause of action for emotional injury absent any allegations of physical contact, and which by this petition this Court has the opportunity to remedy.

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[1] The *Teague* opinion is discussed in greater detail further into this document.

B. The Question Of Whether An Employee's Mental Injury Is Compensable Under The FELA Can Only Be Answered In Light Of The Exact Nature Of The Allegedly Tortious Activity As Well As The Nature And Extent Of The Injuries Suffered.

In *Atchison, Topeka and Santa Fe Ry. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410 (1987), the Supreme Court held that the fact that a workplace injury was caused by conduct that may have been subject to arbitration under the Railway Labor Act, 45 U.S.C.A. Sec. 151 *et seq.* ("RLA"), does not deprive a railroad employee of his right to bring an action for damages under the FELA. That is, in situations that the FELA was designed to address, the RLA is not preclusive. More notable was the Court's refusal to directly prohibit actions for purely emotional injury under the FELA.

What the Court specifically declined to decide was the issue of whether a railroad employee's "wholly mental injury" is cognizable under the FELA, the Court noting that it would require careful scrutiny of each case's particular facts and, more importantly, the question had been neither raised by the parties nor addressed by the district court.

In *Buell*, the respondent, a carman employed by the petitioner railroad, filed an FELA suit alleging that the railroad had condoned his harassment by fellow employees and his immediate supervisors, causing him to suffer an emotional breakdown. Subsequent discovery only confirmed the various incidents of harassment and revealed generally the resulting mental distress, associated physical disorders, and hospitalization of the respondent.

However, being that the railroad's motion for summary judgment was based solely upon the exclusivity of the

grievance remedy provided by the RLA, the Court felt that the record as it existed was insufficiently developed to deal with the question of whether emotional injury is actionable under the FELA. As was explained more fully in a footnote to its opinion:

> Had petitioner moved for summary judgment on the ground that FELA does not recognize claims for respondent's *type of injury*, respondent would have had the opportunity to supplement the record with relevant facts to contest that motion. . . . As we explained last Term, summary judgment is available only when, after *adequate time for discovery* and upon motion, the party seeking summary judgment has satisfied its responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Buell, 480 U.S., at 568 (Fn. 15) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). [emphasis added.]

But, to dismiss the issue on that note would be too simplistic an interpretation of its position, as the Court went on to pinpoint guidelines by which to analyze future emotional injury claims brought pursuant to the provisions of the FELA. Specifically, the Court strongly suggested that ". . . whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the *nature of the injury* and the *character of* the *tortious activity*[,]" and in such an event, ". . . may not be subject to an all-inclusive 'yes' or 'no' answer." *Buell*, at 568, 570. [emphasis added.]

It is with these factors in mind that this Court must decide the matter before it, and it indicates precisely where the Seventh Circuit went astray in its opinion below.

As previously stated, the Court of Appeals has repeatedly failed to recognize the guidelines as provided by the Supreme Court in *Buell*. Once again, the Court declined to decide the issues in *Buell* due to an inadequately developed record below. In other words, the factual record was insufficient with regard to the type of injury: the manner in which injury was inflicted and the degree to which it was suffered. Absent such a record, no decision should or could be reached on the issue. However, in spite of the position taken in *Buell*, the Seventh Circuit's opinions are indicative of a mandate to *exclude* this cause of action without the benefit of any discovery or analysis as to the exact nature of the tortious activity or the extent of the injuries suffered. Effectively, the Court of Appeals is holding that no such cause of action can be sustained, regardless of the facts yet to be presented, even as far as the summary judgment stage, and therefore, the Supreme Court can never be provided with a sufficient factual record upon which to decide this issue.

C. The *Lancaster* Decision Is Insufficient To Answer That Question Expressly Left Open By The *Buell* Decision For The Reason That The Seventh Circuit Has Not Subsequently Addressed The Particular Type Of Tortious Conduct Involved In The Case At Hand.

In the district court, the Respondent, Conrail, primarily relied upon the decision in *Lancaster* to support its argument that the Petitioner's claim is outside the scope of the FELA because it does not allege harm suffered as a result of physical conduct. On the strength of *Lancaster*'s finding that the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact, the district court granted the Respondent's motion to dismiss.

The district court noted that it was bound to follow clear Seventh Circuit precedent, thus concluding that the Petitioner had failed to state a claim under the FELA. The Seventh Circuit affirmed this decision and declined to recognize any significance of *Buell* to its former position and precedent.

However, that *Lancaster*'s holding is of precedential value and dispositive of the question presented on appeal to the Seventh Circuit and by this writ is far from clear. In both *Lancaster* and *Buell*, the Plaintiff had been harassed and threatened by his supervisors, the difference being that in *Lancaster* the conduct in question involved both physical and mental impact. The foremen had engaged in various activities including threatening Lancaster with a broom handle, a sledgehammer and a pickax, pinching him and pulling his hair, in addition to verbally harassing him. *Lancaster*, 773 F.2d, at 811. As a result of this maltreatment, his mental condition deteriorated; he was diagnosed as schizophrenic and is expected never to be well enough to return to work. *Id.*

Faced with these circumstances, the *Lancaster* court had first to answer the question of whether the arbitral remedies provided by the RLA for labor agreement violations precluded an FELA claim in federal court. Regarding this, the court viewed the disputes as falling into three different categories:

> (1) Suppose that [his supervisor] accidentally dropped a brick on Lancaster's foot and broke it. Lancaster unquestionably could bring a tort suit under the FELA . . . for the resulting injury and it would make no difference whether the injury was purely physical or included a mental element as well. . ."

Lancaster, at 814.

At the opposite extreme:

> (2) Suppose Lancaster was claiming that he had not been paid the wage fixed in the collective bargaining agreement. This would be an issue of contract interpretation, hence one for the arbitrators. It would not matter that Lancaster described the underpayment as conversion or some other tort; Congress would have wanted the dispute resolved by the arbitrators and not by a state or federal court.

Id., at 815.

And finally:

> (3) The difficult cases of preemption involve what we may term "nonphysical" torts. . . . The courts see such suits, right or wrong, as endruns around the [RLA's] policy of channeling employment disputes to arbitration. But the courts do not state the issue as one of supersession by the [RLA] of the [FELA], *because no court . . . has thought that any of these new torts arise under the FELA*.

Id. [emphasis added.]

The *Lancaster* court found this analysis to suggest that if the tort is actionable under the FELA, no problem arises concerning supplantation by the RLA. The court then defined a claim arising under the FELA as implicating only those ". . . traditional 'physical' torts, such as assault, battery, and negligent infliction of personal injury . . ." *Id.* Accordingly, the court stated that:

> [T]he FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact—an act such as telling a man he's fired, which is precisely the type of act for which the Railway Labor Act provides a swift and adequate remedy. Although *Yawn*

> *v. Southern Ry.*, 591 F.2d 312 (5th Cir. 1979), points the other way, we find its analysis unpersuasive. Clerical employees claimed to have suffered physical and mental strain because the railroad had not given them enough help for them to be able to do their jobs adequately. In holding that the railroad's conduct might be actionable under the FELA, the court pointed out correctly that a railroad worker who incurs physical or mental injury from unsafe working conditions has an FELA claim. . . . But the complaint was not that working conditions were unsafe; it was that clerical employees had been given too much—not too dangerous—work to do. This is not our idea of an FELA claim; it has nothing to do with the security of the persons from physical invasions or menaces.

Lancaster, 773 F.2d. at 813.

Concluding that Lancaster had alleged "conventional torts involving offensive physical contact or, in the case of assault, placing the victim in apprehension of an imminent such contact," the court held that such conduct was actionable under the FELA, and affirmed the jury verdict of $850,000 for the Plaintiff. *Id.* at 815.

Thus, the Seventh Circuit's reliance on the *Lancaster* decision as controlling on the issue raised by the Petitioner James A. Ray's complaint is misplaced. A fair reading of *Buell* demonstrates that a railroad employee or his representative cannot be barred from pursuing an action under the FELA merely because the conduct that allegedly injured the employee could have been the subject of an arbitration under the RLA. The only question the Court *did not* answer in that opinion was whether "purely emotional injury," defined in terms of the *source* not the nature of the employee's injury (See *Buell*, at 563-64, Fn. 10), is compensable under the FELA. It necessarily follows, then, that this issue, decided in the negative in *Lancaster*, requires reconsideration in light of the discussion

by the Supreme Court in *Buell*. By that opinion, the Supreme Court sent a message to the circuit courts to decide each case upon its particular facts, thus leaving the door open for those emotional injury claims found to involve egregious conduct and genuine and severe emotional injury. Nothing in the *Buell* opinion contemplated precipitous dismissal of these causes of action. To follow the guidelines of the Supreme Court, the Seventh Circuit properly should have remanded this matter to the district court for a full development of the factual record and further proceedings.

Interestingly, the Seventh Circuit has never been presented with a set of facts and circumstances comparable to those involved in the case at hand. Yet, in spite of wholly divergent factual situations, both the District Court and the Court of Appeals cite the *Hammond* and *Gillman* cases, both decided subsequent to *Buell*, as reaffirming the *Lancaster* opinion. Upon this interpretation, the Courts below agreed that this renewed viability of *Lancaster* mandated dismissal of the Petitioner's complaint for failure to allege that his injury stemmed from physical conduct as required by the FELA.

However, in *Gillman*, the Plaintiff, a railroad employee, was performing maintenance work on the Defendant's tracks in its yard in Chicago, Illinois. A piece of rail, which was being lifted by crane, accidentally hit some railroad cars that were being switched on an adjacent track. As a result, the crane operator dropped the piece of rail, which struck one of Gillman's co-workers and started to drag him under the train. Gillman was unaware that the accident had occurred until he heard the co-worker's scream and went to the place of the accident. He was not physically contacted or hurt, yet claimed that he suffered shock to his nervous system and severe emotional distress as a result of the accident. *Gillman*, 878 F.2d, at 1020-21.

The Court then applied the *Rickey*[2] test, as adopted by the Illinois courts, to this particular set of facts, noting that "[o]n more than one occasion, Illinois courts have dismissed actions for negligent infliction of emotional distress because the complaint failed to allege that the Plaintiff felt fear for his own safety," one of the three elements of the *Rickey* standard. *Gillman*, at 1025. In this instance, the court found that

> [t]he appellant's second amended complaint fails to allege that Gillman felt any contemporaneous fear for his own safety. Indeed, the complaint is void of any allegation as to Gillman's *state of mind.* His complaint alleges that he heard a scream and he noticed that one of his co-workers was caught by a piece of rail. Based on this allegation, Gillman could not have felt fear for his own safety because he apparently was not even aware of the accident at the time that it occurred. Notably absent from his complaint is any allegation stating that he was afraid the falling rail might hit him, or that he even saw the rail fall.

Id. [emphasis added.]

In comparison, the Seventh Circuit's holding in *Hammond* is not grounded upon a "zone of danger" analysis, but rather on the basis that ". . . Hammond's original claim was based on the collective bargaining agreement rather than on the tort principle embodied in the FELA." *Hammond*, 848 F.2d, at 98. That Plaintiff's pleading contained only allegations of unmeritorious disciplinary charges filed by the railroad concerning the Plaintiff. The court described this as ". . . a pure breach of contract claim, like a claim of having been fired without just cause; and the contract is the collective bargaining agreement." *Hammond*, at 97.

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[2] *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983).

In summary, prior holdings in the Seventh Circuit have dealt on the one hand with a case involving physical *conduct*, but no physical *contact*, and on the other hand, one of the "extreme" circumstances as described in *Lancaster* involving an issue that clearly arises (and, hence, should be resolved) from the context of the collective bargaining agreement. It follows, then, that the facts of this appeal present a case of first impression in the Seventh Circuit. As this was the case, the Court of Appeals certainly would have been aided by consulting other authorities outside this circuit as well as the Supreme Court's discussion of the issue in *Buell*.

There is no physical conduct alleged by the Petitioner which would make this a case amenable to any sort of "zone of danger" scrutiny, as was the situation in *Gillman* where the *Rickey* standard was adopted. Also, unlike the *Hammond* case, these facts do not indicate a minor dispute under the exclusive jurisdiction of the RLA. Therefore, in light of this apparent deficiency in prior case law, the Petitioner strongly suggests that a review of the applicable case law as it has developed in other circuits would be extremely beneficial in deciding the fate of this writ. In *Buell*, the court desired a sufficiently developed factual record, however, the opinion below obviates any such possibility.

D. A Cause Of Action For Emotional Or Mental Injury With Physical Manifestation Allegedly Caused By Negligent Or Intentional Misconduct Of An Employer Lacking any Physical Contact Is Compensable Under The FELA.

The law is becoming settled regarding the issue that a claim for the negligent infliction of emotional distress is cognizable under the FELA. *See, Teague v. Amtrak*, 708 F.Supp. 1344 (Mass. 1989) *Amendola v. Kansas City Southern Ry.*, 699 F.Supp. 1401 (W.D. MO. 1988); *Althoff*

v. Conrail, C.A. No. 87-4384, 1988 WL 61734 (E.D. Pa. 1988); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y. 1987); *Gillman v. Burlington Northern*, 673 F.Supp. 913 (N.D. Ill. 1987). *See also, Hagarty v. L&L Marine Services, Inc.*, 788 F.2d 315 (5th Cir), *modified* 797 F.2d 256 (5th Cir. 1986) (permitting a seaman to sue, under the Jones Act, for serious mental distress); *Taylor v. Burlington Northern*, 787 F.2d 1309 (9th Cir. 1986); *cf. Gaston v. Flowers Trans.*, 675 F.Supp. 1036 (E.D. La. 1987) *aff'd*, 886 F.2d 816 (5th Cir. 1989) (suggesting, but not ruling, that such a claim is cognizable); *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991) (claim for negligent infliction of emotional distress is cognizable under FELA and Jones Act, even without accompanying physical injury or contact).

Further, as noted in *Buell*, most states now recognize a tort of intentional infliction of emotional distress, and many recognize a tort of negligent infliction of emotional distress. *See*, Prosser and Keaton on the Law of Torts, section 54 at 364-365 (5th Ed. 1964); Restatement (Second) of Torts, Sections 436, 436A and Comments.

The most persuasive of these cases comes from the United States District Court for the District of Massachusetts and deserves some further discussion. In *Teague*, the Plaintiff filed a claim against the Defendant under the FELA asserting that his superiors subjected him to embarrassment, humiliation, harassment, degradation, and other severe emotional distress. He claimed that their conduct caused him to suffer both psychological and physical harm.

The *Teague* court began its analysis by citing both *Buell* and *Gillman* in support of its position that, given the state of common law, a negligent infliction claim is indeed cognizable under the FELA. It then stated the more difficult question as being ". . . whether Teague's claim,

which reports no zone of danger element, is cognizable." *Teague*, at 1353. [emphasis added.]

In answering this question, the *Teague* court pointed out that "[w]ith respect to the absence of immediate physical injury or its threat, the *Buell* complaint is strikingly similar to that of *Teague*." *Teague*, at 1356. The court, therefore, chose to look to the "significant silences" of the Supreme Court.

In other words, the *Teague* court found instructive the fact that the Supreme Court *did not rule* that a Plaintiff is barred from recovery for negligent infliction of emotional distress where the complaint alleges mere harassment and the injury does not result from any physical invasions or menaces, although the factual record was sufficiently developed to allow a ruling on the issue. *Id.* at 1356.

In light of the *Buell* opinion, the *Teague* court chose to reject such an analysis as in *Gillman* as too narrow a limitation on what it perceived to be the ever-expanding reach of the FELA. The *Teague* court chose instead to follow the guidelines suggested by the Supreme Court, and adopted the majority rule that actual or threatened impact is unnecessary to a negligent infliction claim under the FELA and that objective symptomatology of the mental distress will suffice. *Id.*

Similarly, the *Teague* court bowed to common law developments with regard to intentional infliction by holding that, if not unquestionably actionable under the FELA, the recognitions of such claims as the majority rule, should at least place an informal burden on Defendants to articulate why they should be dismissed. *Id.* at 1359.

Indeed, this is the more enlightened approach. The FELA is a living, growing document—it is a broad statute meant to be even more broadly interpreted. *Buell*, 480 U.S. at

561-62; *Halko*, 677 F.Supp. at 139-141. If this Court adheres to that principal, then it is clear that the Seventh Circuit has strayed from the import of *Buell*. In *Buell*, the Plaintiff had not alleged any "physical invasion or menace" in substance different from that alleged by the Petitioner here. In *Buell*, the Plaintiff's complaint alleged that his emotional injury stemmed from the Defendant Railroad's failure, in the court's words:

> . . . to provide [him] with a safe place to work, including, but not limited to, having fellow employees harass, threaten, intimidate [him] [sic], and in particular, foreman Ed Wright threatened, harassed, and intimidated [him] maliciously and oppressively, negligently, and intentionally, in order to cause personal injury to [him] and to cause mental and emotional suffering. All said acts were condoned and approved by [the Railroad] and as a direct and proximate result of said negligence and intentional acts, [he] was caused to suffer an emotional breakdown, thus inflicting on him injuries and damages as hereinafter alleged.

Buell, 480 U.S. at 559 (quoting the complaint).

Most of the incidents of which the Plaintiff Buell complained involved his foreman, who allegedly insisted:

> . . . that respondent and other carmen complete certain car inspection reports in an improper manner, directed respondent to help him remove company property from the yard, repeatedly threatened to discharge respondent, and condoned conduct by other employees that was obviously intended to humiliate respondent.

Id., at 559-560, n.1.

For that reason, the opinion in *Gillman* (relied upon by the District Court and cited by the Seventh Circuit panel) does not enlighten this Court on this issue. *Gillman*, in

requiring that physically dangerous conditions or occurrences bring on mental distress in order to permit recovery under the FELA, requires too much of a Plaintiff. In *Buell*, although the factual record was sufficiently developed in that respect had it wished to address the point, the Supreme Court did *not* rule that the Plaintiff was barred from recovery for negligent infliction of emotional distress for mere harassment because his injury was not caused by "physical invasions or menaces." In permitting recovery under the circumstances alleged by the Petitioner in this instant case, the Petitioner James A. Ray was merely urging the Seventh Circuit to adopt the common law *majority* rule that actual or threatened impact is unnecessary to a negligent infliction claim under the FELA and that objective symptomatology of the mental distress will suffice. *Amendola, supra*, 699 F.Supp. at 1408-10; *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1986). It is for that reason, perhaps, that the Seventh Circuit in its opinion in *Gillman* refused to close the door on an action seeking damages for a purely emotional injury under the FELA.

The Petitioner's claim for intentional infliction of emotional distress is similarly well-pled. It is clear that the FELA covers at least some intentional torts. See, for example, *Buell*, 480 U.S. at 562, n. 8; *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440 (1930) (Assault); *Alph S.S. Corp. v. Cain*, 281 U.S. 642, 50 S.Ct. 443 (1930) (Assault); *Brooks v. Washington Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir.) (Assault) *cert. denied*, 442 U.S. 910 (1979); *Slaughter v. Atlantic Coast Line R.R.*, 302 F.2d 912 (D.C. Cir.) (False Arrest), *cert. denied*, 371 U.S. 827 (1962).

In *Jamison*, the Court determined whether "negligence" included the intentional tort of assault under the FELA. In so doing, the Supreme Court held first that the FELA

is not to be narrowed by refined reasoning or for the sake of giving negligence a technically restrictive meaning. As such, it held that "it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the act." *Jamison*, 281 U.S. at 641. To hold that the Petitioner's claim for intentional infliction of emotional distress is viable is merely to (1) give meaning to a liberal construction of the FELA as is required to fulfill Congress' intent (see *Jamison*, 281 U.S. at 640), and (2) to adopt the majority rule as recognized by thirty-seven (37) jurisdictions. *Leithead v. American Colloid Co.*, 721 P.2d 1059, 1066 (Wyo. 1986).

E. It Is The Source Of The Injury, And Not The Nature Of The Injury, Which Makes Petitioner's Claim Peculiarly Appropriate For Redress Under The FELA.

The Respondent made much of the non-physical nature of Petitioner's injury[3] as if that alone answers the question of whether the FELA provides recourse to Petitioner for his complaints. Further, the Supreme Court acknowledged in its discussion in *Buell*, that it is the source of the injury, and not the nature of the injury, that is the touchstone of any analysis of this issue under the FELA. For, in the end, if a railroad worker commits suicide after being "harassed, threatened and intimidated" by his supervisor, or if a railroad worker is killed when a locomotive runs him over in the scope of his employment due

[3] The court should again note Petitioner's complaint, which pleads emotional injuries accompanied by physical manifestations, and physical injuries, and not merely emotional injuries. As such, Petitioner claims more than "purely emotional injury", and Respondent's characterization of Petitioner's injuries is, at best, self-serving.

to the railroad's negligence, actions brought on behalf of either of these fatally injured workers spring from the railroad's failure to provide a safe place to work "resulting in whole or in part from the negligence of any of the officers, agents or employees of such [railroad] carrier. . . ." FELA, 45 U.S.C.A. Sec. 51, *et seq.* Thus, any attempt to minimize the nature of a claimed injury as being merely an "emotional injury" even when coupled by physical ills or manifestations in the end works an injustice to those who bear these injuries, especially as the settled common law in the majority of jurisdictions permits recovery for the negligent or intentional infliction of emotional distress.

The subtle distinction that it is the source of the injury, and not the nature of the injury, that is the touchstone of this analysis of the FELA arises first from the words of the statute itself, as the statute speaks of those "suffering injury . . ." (45 U.S.C.A. Sec. 51) glaringly omitting the term *physical injury* which the railroads attempt to graft into the statute. In addition, and most importantly, the reason for the FELA at its inception, and for its continued viability, is the pervasive mindset of the railroads regarding their employees, that is, their failure or unwillingness to institute safety measures or operate their business in a manner which does not pose a risk of harm different than that which one might otherwise expect. This failure of the railroads, individually and collectively, to take those measures necessary to make the FELA a creature of a forgotten past describes a mentality and mindset which may allow or permit the types of actions which Petitioner contends he was subject to and which require a remedy.

It is precisely for these reasons that the FELA has been routinely characterized as a statute which has broad

import susceptible to liberal interpretation. *Atchison, Topeka and Santa Fe Ry. v. Buell*, 480 U.S. 557, 561-62, 107 S.Ct. 1410 (1987); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135, 139-41 (S.D.N.Y. 1987). The FELA "was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449 (1957) (footnote omitted), *quoted in Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013, 95 S.Ct. 333 (1974). Thus, the FELA views the railroad "as a unitary enterprise, its economic resources obligated to bear the burden of *all injuries* befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 330, 78 S.Ct. 758, 762 (1958). [emphasis added].

In light of this intended scope, the concept of "injury" under the FELA is extremely broad; the Act encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees. *Buell v. Atchison, Topeka and Santa Fe Ry.*, 771 F.2d 1320 (9th Cir. 1985).

Moreover, an "injury" need not be inflicted by "external, violent or accidental" means for it to be compensable under the FELA:

> On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury,

> except that it must constitute negligence attributable to the carrier; or the particular kind of injury.

Urie v. Thompson, 337 U.S. 163, 181, 69 S.Ct. 1018, 1030 (1949).

The Court further stated that restricting interpretations of the Act would conflict with the Act's purpose:

> . . . restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purposed, and the constant and established course of liberal construction of the Act followed by this Court.

Urie, 337 U.S. at 181-82, 69 S.Ct. at 1030-31.

Relying on *Urie*, the Court in *Randall v. Reading Co.*, 344 F.Supp. 879, 882 (M.D.Pa. 1972) found that the railroad employee need not suffer bodily injury to recover under the FELA. Also relying on *Urie*, the California Supreme Court has expressly recognized that a mental injury may be compensable under the FELA. *See, McMillan v. Western Pacific R.R.*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960). Finally, damages for emotional distress accompanying physical injuries are recoverable in traditional FELA actions. *See, Erie R. Co. v. Collins*, 253 U.S. 77, 87, 40 S.Ct. 450, 453 (1920); and *Bullard v. Central Vermont Ry., Inc.*, 565 F.2d 193, 193 (1st Cir. 1977).

CONCLUSION

The Petitioner, James A. Ray, respectfully requests that a writ of *certiorari* issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-3420

JAMES A. RAY,

Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
a/k/a CONRAIL,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 3150—**Ilana D. Rovner**, *Judge.*

ARGUED SEPTEMBER 24, 1990—DECIDED JULY 22, 1991

Before BAUER, *Chief Judge*, COFFEY and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* James A. Ray seeks damages from his employer, Consolidated Rail Corporation ("Conrail"), under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51. Ray alleged in his complaint that his supervisor "threatened, harassed, and intimidated [him] maliciously and oppressively, negligently and intentionally in order to cause personal injury to [him] and to

cause mental and emotional injury to [him]." As a result of these and other acts allegedly condoned by Conrail, Ray claims that he suffered a mental and physical breakdown and other injuries. In response to plaintiff's complaint, Conrail moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that a wholly mental injury is not compensable under the FELA, because it does not result from physical contact or threat of physical contact. The district court subsequently dismissed the complaint for failure to allege that the injury resulted from physical contact or threat of physical contact; plaintiff now appeals that decision.

I.

In our review of the district court's decision to grant the motion to dismiss, we accept all facts alleged in the complaint as true, and draw all inferences therefrom in favor of the appellant. *Yeksigian v. Nappi*, 900 F.2d 101, 102 (7th Cir. 1990); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). We will affirm the dismissal only if it is clear that relief cannot be granted under any set of facts alleged. *Yeksigian*, 900 F.2d at 102.

Whether recovery under the FELA requires proof of physical contact or the threat of physical contact already has been decided in the Seventh Circuit. *See Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032, 109 S. Ct. 1170 (1989); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S. Ct. 1602 (1987); *see also Gillman*, 878 F.2d at 1025 (Kanne, J., concurring) (no claim for relief for negligent infliction of emotional distress exists under FELA). In 1985, we addressed this issue specifically and found "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact . . . ." *Lancaster*, 773 F.2d at 813. Before the issue was presented again to this court, the Supreme Court in a 1987 case reserved the question of whether or not a plaintiff can recover for purely emotional injuries under FELA. *Atchison*,

Topeka & Santa Fe Co. v. Buell, 480 U.S. 557, 569, 107 S. Ct. 1410, 1417 (1987) ("whether one can recover for emotional injury [under the FELA] *might* rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity") (emphasis added). In 1988, we considered the issue once again and found that plaintiff's complaint which alleged deliberate infliction of emotional distress had no merit when reviewed under the principles set forth in *Lancaster*, even in light of *Buell*. *See Hammond*, 848 F.2d at 98 (plaintiff's complaint, while not frivolous in view of *Buell*, was "clearly barred by *Lancaster*").

II.

Appellants today urge us to reconsider our position in *Lancaster*, given the Supreme Court's guidance provided in *Buell*. However, when we considered *Hammond* in 1988, we also considered *Lancaster* in light of *Buell* and still found that an injury under FELA requires physical contact or the threat of physical contact. Appellants argue that *Hammond* is entirely distinguishable from *Lancaster*, *Buell* and the case before us today. We disagree. The precise question of whether the FELA permits recovery for damages where plaintiff does not allege physical contact or threat of physical contact was presented in all three cases and is presented again today. In *Buell* the Court declined to address the question; that the Supreme Court reserved the issue provides at best weak support for the change in our position that plaintiff seeks today. We remain unpersuaded that we must, in light of *Buell*, or other authorities outside this circuit, recognize emotional injury under FELA where there is no showing of physical contact or threat of physical contact.

III.

We reiterate that the injury must result from physical contact or the threat of physical contact for the plaintiff to recover under the FELA. We therefore, AFFIRM the district court's decision to dismiss plaintiff's complaint.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 22, 1991

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable John L. Coffey, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 89-3420

JAMES A. RAY,

Plaintiff-Appellant

v.

CONSOLIDATED RAIL CORPORATION,
also known as CONRAIL,

Defendant-Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 89 C 3150, Judge Ilana D. Rovner

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX B

[721 F.Supp. 1017 (N.D. Ill. 1989)]

James A. RAY, Plaintiff,

v.

CONSOLIDATED RAIL CORP. (a/k/a Conrail), Defendant.

No. 89 C 3150.

United States District Court,
N.D. Illinois, E.D.

Sept. 28, 1989.

Employee brought action against railroad for injuries allegedly sustained as result of harassment by co-worker. On railroad's motion to dismiss, the District Court, Rovner, J., held that employee's claim was not within scope of Federal Employers' Liability Act in absence of allegation that conduct which harmed employee was physical in nature.

Dismissed.

* * * * *

Bernard R. Nevoral, David L. Cwik, Bernard R. Nevoral & Assoc., Ltd., Chicago, Ill., for plaintiff.

Gerald L. Maatman, Jr., Baker & McKenzie, Chicago, Ill., for defendant.

MEMORANDUM OPINION AND ORDER

ROVNER, District Judge.

I. INTRODUCTION

This action arises out of alleged harassment of plaintiff James Ray by an agent of defendant Consolidated Rail Corp. ("Conrail"). Conrail has filed a motion to dismiss which presents an issue concerning the scope of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"), on which plaintiff purports to base his claim. For the reasons described below, the Court finds that the FELA does not encompass plaintiff's claim and grants Conrail's motion to dismiss.

II. FACTS

The factual allegations of plaintiff's complaint, which the Court accepts as true for purposes of Conrail's motion, *see Marmon Group, Inc. v. Rexnord, Inc.*, 822 F.2d 31, 34 (7th Cir. 1987), are brief enough to warrant quotation in their entirety:

> . . . [D]efendant CONRAIL, through its officers, agents or employees, conducted the railroad business negligently and unlawfully and failed to provide plaintiff with a reasonably safe place to work, including, but not limited to, having fellow employees harass, threaten, and intimidate plaintiff and in particular district claims agent, Robert L. Huggins, threatened, harassed, and intimidated plaintiff maliciously and oppressively, negligently and intentionally, in order to cause personal injury to plaintiff and to cause mental and emotional injury to plaintiff. All aforesaid acts or omissions were condoned or approved by the defendant, CONRAIL, and in whole or in part of said negligence and intentional torts, plaintiff was caused to

> suffer a mental and physical breakdown and other injuries.
>
> . . . [A]s a result of the negligent and intentional acts or omissions of the defendant and its employees and/or agents, in whole or in part caused plaintiff to suffer severe personal injuries, severe mental and emotional injuries, causing plaintiff to incur medical and allied expenses and will in the future cause plaintiff to incur medical and allied expenses; has caused and will in the future cause the loss of earning capacity; has caused and will in the future cause pain and suffering on behalf of the plaintiff.

(Complaint ¶¶ 4-5.)

Significant for purposes of this opinion is that although plaintiff alleges both mental and physical injuries, he makes no allegation that the conduct which harmed him was physical in nature.

III. ANALYSIS

Conrail argues that plaintiff's claim is outside the scope of the FELA because it does not allege that he suffered harm as a result of physical conduct. Conrail relies primarily on *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987). In *Lancaster*, the court ruled that a tort which arose from both physical and non-physical conduct was within the scope of the FELA and that the resulting FELA action was not barred by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). In doing so, the court stated that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." 773 F.2d at 813. Similarly, the court stated that "the FELA does not reach torts which work their harm

through nonphysical means," and that "a claim under the FELA . . . means a claim for violation of one of the traditional 'physical' torts, such as assault, battery, and negligent infliction of personal injury." 773 F.2d at 815.

Subsequent to *Lancaster*, the Supreme Court ruled in *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), that an action otherwise arising under the FELA is not barred solely because it is also subject to arbitration under the RLA. The Supreme Court specifically left open the "question whether 'emotional injury' is cognizable under the FELA." 480 U.S. at 567-71, 107 S.Ct. at 1417.

The Seventh Circuit reaffirmed *Lancaster* in *Hammond v. Terminal Railroad Ass'n of St. Louis*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1170, 103 L.Ed.2d 229 (1989). In that case, plaintiff had filed an amended complaint charging the railroad with:

> unfairly criticizing the plaintiff's work, prosecuting unwarranted disciplinary charges against him, setting unrealistic work quotas and "wearing him out physically and mentally thereby," harassing him by "keeping an extraordinarily close watch on [his] work and following him from work assignment to work assignment," conducting disciplinary proceedings against him unfairly (as by tricking him into signing a waiver of his right to a formal investigation), and, by these tactics, deliberately inflicting emotional distress on him.

848 F.2d at 96. The court stated:

> [I]n *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 813 (7th Cir. 1985), we held that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." Given *Lancaster*, the present suit, even as embroidered in the amended complaint, has no merit.

848 F.2d at 96. *See also Gillman v. Burlington Northern Railroad Co.*, 878 F.2d 1020, 1025 (7th Cir. 1989) (Kanne, J., concurring) ("no claim for negligent infliction of emotional distress exists under FELA").

Conrail argues that *Lancaster* and *Hammond* mandate dismissal of plaintiff's complaint for failure to allege that his injuries stemmed from physical conduct. Plaintiff essentially argues in response that *Lancaster* and *Hammond* are not controlling in light of *Buell* and in light of a variety of cases from other jurisdictions, citing, *inter alia*, *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir. 1986); *Taylor v. Burlington Northern*, 787 F.2d 1309 (9th Cir. 1986); *Amendola v. Kansas City Southern Ry.*, 699 F.Supp. 1401 (W.D. Mo. 1988); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y. 1987); *Gaston v. Flowers Trans.*, 675 F.Supp. 1036 (E.D. La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989). Initially, the Court notes that it is bound to follow clear Seventh Circuit precedent, notwithstanding any contrary views which may be held by courts in other circuits. With respect to *Buell*, the Court rejects plaintiff's argument that the Supreme Court rejected the analysis set forth in *Lancaster*. The opinion in *Buell* is consistent with *Lancaster*'s holding with respect to the relationship between the FELA and the RLA, and, in any event, that relationship is immaterial to *Lancaster*'s holding that the FELA is limited to torts of a physical nature--a holding that *Buell* in no way affected. Furthermore, *Lancaster*'s holding was specifically reaffirmed in *Hammond* after the Supreme Court decided *Buell*. In light of *Lancaster* and *Hammond*, the vitality of which the Court has no reason to doubt, the Court agrees with Conrail that plaintiff fails to state a claim under the FELA.

IV. CONCLUSION

Plaintiff's complaint is dismissed for failure to allege that his injury stemmed from physical conduct as required by the FELA. Because it is not clear from the complaint that no such allegation could be made within the strictures of Fed.R.Civ.P. 11, the dismissal is without prejudice. If an amended complaint is not filed by October 10, 1989, final judgment will be entered pursuant to Fed.R.Civ.P. 58.